TOH SEOW NGAN & ORS.

v.

TOH SEAK KENG & ORS.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
AJAIB SINGH SCJ
[SC CIVIL APPEAL NO. 02-142-89]
20 APRIL 1990

CIVIL PROCEDURE: *Consent order - Affects rights of third parties - Validity - Defect - Ex debito justitiae - Breach of rule of natural justice - Considerations by Court - Principle of estoppel by conduct.*

The 1st respondent/petitioner (Toh) was a director and shareholder of 140,000 shares in the 5th respondent company; the 5th appellants owned a total of 250,000 shares. A management dispute arose between the 1st respondent and the other three directors (2nd, 3rd and 4th respondents) resulting in his removal as managing director of the company. Being a minority shareholder, he challenged his removal from office pursuant to s. 181 of the Companies Act 1965; alternatively claiming that the other directors purchase his 140,000 shares at a price to be fixed.

When Toh's petition came up for hearing, he was absent; however a consent order was apparently recorded where it was ordered that two of the co-directors should purchase Toh's 140,000 shares as well as the 250,000 shares at a price of RM1.90 per share.

The appellants commenced proceedings for the setting aside of the consent order and this was consolidated with the respondents' application for execution of the consent order.

At that hearing the respondents conceded that when the consent order was made, the Court had no jurisdiction to make the consent order affecting the rights of the appellants. Notwithstanding this the Court dismissed the appellants' suit to set aside the consent order even to the limited extent that it affected the appellants. The Court's decision was based on the principles of estoppel by conduct.

Toh himself made two attempts to set aside the consent order, one being a petition in summons-in-chambers and the other a civil suit; both were dismissed. The appellants in addition to this civil suit had also taken out a summons-in-chambers seeking leave to intervene which was granted.

Held:

[1] There can be no doubt that the consent order was made without jurisdiction in so far as it binds and affects the appellants. Indeed the appellants had nothing to do with the dispute in the petition and had never instructed anybody to include them or their interests in the consent order.

[2] (a)On the facts of this case, it cannot be said that the appellants were guilty of standing by and watching Toh fight out the legal battle within the principle laid down by Lord Penzance in *Wytcherley v. Andrews* [1871] LR 2P & M 327.

(b) The appellants went beyond just standing by and watching the issues fought out. It seems clear that each of them had directed their minds to the need to have the consent, order set aside.

(c) It is not true that the appellants took active participation in both the petition and Toh's civil suit. The joint affidavits filed by the appellants were both in aspect of the petition. The appellants were active in the petition only until they obtained the order to intervene. It is therefore incorrect for the learned Judge to conclude that the appellants intended to use Toh's civil suit for the purpose of setting aside the consent order.

(d) There is therefore no basis upon which the learned Judge could have come to the conclusion that there was estoppel by conduct on the part of the appellants.

[3] Another reason why the principle of estoppel of conduct should not apply in this case is based on the fact that the rights of the appellants and Toh to set aside the consent order are founded on entirely different basis. As far as the appellants are concerned, all the respondents have readily conceded that the consent order was made without jurisdiction and therefore it is the duty of the Court to consider whether the appellants are entitled *ex debito justitiae* to set aside the consent order.

[4] The existence of the order to intervene should constitute a sufficient "technical legal reason to the contrary" to prevent the application of the estoppel by conduct exception to the general rule - see *Abuakwa v. Adanse* [1958] AC 95.

[5] The definition of defects that brings an order into the category that attracts *ex debito justitiae* has not been finally defined save according to Lord Diplock "... that it includes orders that have been obtained in breach of the rules of natural justice." See *Isaacs v. Robertson* [1984] 2 All ER 140.

[6] It should be emphasised that the principle stated by Lord Penzance in *Wytcherley v. Andrews* and applied in *Abuakam v. Adanse* relating to estoppel by conduct as a special exception to the cardinal rule of natural justice that a party must be given an opportunity to be heard before he is adversely affected is founded on justice and common sense. It should therefore never be applied except in the cause of justice and in a clear situation where a person in the same interest had the opportunity to be a party or to intervene but failed to do so. It is certainly inapplicable where an aggrieved party is entitled to a remedy *ex debito justitiae*.

[7] The defects in the present consent order are such that the appellants are entitled to have it set aside *ex debito justitiae* as far as it affected them. If the learned Judge had directed his mind on the proper exercise of the inherent jurisdiction of the Court he would have exercised it in favour of the appellants and he would have ordered the consent order as far as it affected their shares in the company to be discharged. The appellants are therefore not estopped from challenging the validity of the consent order.

[Appeal allowed. Consent order as far as it affects the appellants set aside.]

Cases referred to:
Abuakwa v. Adanse [1957] 3 All ER 559; [1958] AC 95
Henderson v. Henderson [1843] 3 Hare 100
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581
Wytcherley v. Andrews [1871] LR 2P & M 327
Ee Kim Kin v. The Collector of Land Revenue, Alor Gajah [1967] 2 MLJ 89
Isaacs v. Robertson [1984] 2 All ER 140
Hadkinson v. Hadkinson [1952] 2 All ER 567

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

For the appellants - Loh Siew Cheang; M/s. Cheang & Ariff
For the respondents - S. Selvarajah; M/s. Fernandez & Co.

JUDGMENT

Mohd. Azmi SCJ:

Toh Seak Keng, the 1st respondent/petitioner was a director and shareholder of the 5th respondent company (Yew Lee Feedmill Sdn. Bhd.). Apart from 140,000 shares registered in his name, the present appellants, namely, his brother, wife and three sons separately owned a total of 250,000 shares in the company. A management dispute arose between Toh and the other three directors (2nd, 3rd and 4th respondents) resulting in his removal as managing director of the company. As a minority shareholder, he filed an Originating Petition No. C2 of 1982 in the Kuala Lumpur High Court under s. 181 of the Companies Act 1965, challenging his removal from office, and in the alternative praying for the purchase of his entire 140,000 shares of the company by the other directors at a price to be fixed.

On 3 October 1983, Toh was absent when his petition came up for hearing. But a consent order was apparently recorded at the behest of the Counsels of both sides by which it was ordered that two of the co-directors should purchase not only Toh's entire 140,000 shares but also the 250,000 shares registered in the names of the present five appellants at a price of RM1.90 per share.

There is no dispute that the consent order is defective, and as far as the purchase of the appellants shares are concerned, it is conceded that the said order was made without any consent or instruction. At the material time, the appellants were not even parties to the petition which was specifically filed by Toh for the purpose of buying him out of the company, in lieu of a declaration by the Court that he was still the managing director of the company. Indeed, the appellants had nothing to do with the dispute in the petition and had never instructed anybody to include them or their interests in the consent order. In our judgment, there can be no doubt that the consent order was made without jurisdiction in so far as it binds and affects the appellants. Before the learned Judge, the appellants' civil suit to set aside was by order of Court consolidated with the respondents' application for execution of the consent order. The parties agreed that the matters in dispute be resolved on the preliminary issue is whether the appellants were estopped from challenging the validity of the consent order.

At the hearing, the respondents had conceded that when the consent order was made the Court had no jurisdiction to make an order binding on the appellants. If the Court had no jurisdiction to make the consent order affecting the rights of the appellants, we would have thought that the next point would be to consider whether they were entitled to have it set aside *ex debito justitiae*. Be that as it may, the learned Judge proceeded to hear the preliminary issue and dismissed the appellants' suit to set aside the consent order even to the limited extent that it affected them. He relied on the following speech of Lord Denning in the Privy Council case of *Abuakwa v. Adanse* [1957] 3 All ER 559; [1958] AC 95 at 101:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties, a "privy" as he is called, is bound equally with the parties, in which case he is estopped by *res judicata*: the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

The appellants were not in privity with the parties to the petition, but the learned Judge held that on the evidence the present case came within the second exception to the general rule. He cited and relied on the judgment of Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100, at 115 referred to by the Privy Council in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor*. [1975] AC 581 at 590. The passage in the judgment relied upon reads:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The learned Judge also relied on the principle stated by Lord Penzance in *Wytcherley v. Andrews* [1871] LR 2P & M 327 at p. 328 to the effect that "if a person knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he was estopped from litigating the matter afresh." This principle was applied by the Privy Council in *Abuakwa v. Adanse, ante*, "in the absence of technical legal reasons to the contrary." Such estoppel by conduct may consist in active participation in the previous proceedings, or in obtaining an actual benefit from the judgment in previous proceedings (see *Ee Kim Kin v. The Collector of Land Revenue, Alor Gajah* [1967] 2 MLJ 89 at 90), or it may even consist in standing by and watching other parties fight on the battle or at most giving evidence in support of one side or the other.

In this case, apart from the appellants, petitioner Toh himself was dissatisfied with the validity of the consent order which enabled the directors of the company to purchase his entire 140,000 shares at RM1.90 per share. Without joining the appellants as parties, he made two attempts to set aside the order but was unsuccessful. The first application was on 17 December 1984 by summons-in-chambers in the petition which was dismissed by another Judge on procedural ground. The second attempt was by a Civil Suit No. C 2169/85 which was struck out under O. 18 r. 19, Rules of the High Court 1980 on the ground that the averments in the statement of claim and the prayer sought were identical to the earlier chamber application. Toh appealed to the Supreme Court against the striking out order but it was summarily dismissed. It was on 12 December 1986 that the appellants took out the present Civil Suit No. C4-22-295 of 1986 seeking for the setting aside of the consent order in so far as it affected them. They cited the present respondents *viz.* petitioner Toh, the three directors, and the company as defendants. But about a year earlier, on 9 December 1985, pending the disposal of Toh's Civil Suit No. C2169/85, the appellants had also taken out a summons-in-chambers in the originating petition seeking leave to intervene. The Court granted them leave on 17 January 1986 whereby for the first time they became interveners in the petition. It is pertinent to note that there was no appeal against that order. Clearly therefore that both petitioner Toh and the appellants took separate actions to set aside the consent order, and it cannot be said aside that the appellants were guilty of standing by and watching Toh fight out the legal battle within the principle laid down by Lord Penzance.

The active participation relied upon by the learned Judge as constituting estoppel by conduct had reference firstly to the 1984 summons application by Toh in the originating petition to set aside the consent order on the ground that he had never given instructions to his Counsel

on the terms of the order. Toh's application was supported by the appellants joint affidavit in which they confirmed that each one of them was the registered owner of 50,000 shares in the 5th respondent's company, and that they had never given instruction in respect of the consent order. Toh's application was dismissed because according to the learned Judge, the consent judgment "had been perfected and accordingly could not be set aside at the instance of only one of the parties" in the petition. The merit of the application was apparently never adjudicated by the Court. The second active participation by the appellants which the learned Judge regarded as constituting estoppel by conduct related to another interlocutory application in the petition made by Toh on 9 December 1985 seeking a stay of execution of the consent order pending determination of his Civil Suit No. C2169/85. In this proceeding for stay, the appellants again filed a joint affidavit supporting Toh's application. By lending their support in both the interlocutory applications in the petition, the learned Judge ruled that they were estopped by conduct from challenging the validity of the consent order. At p. 17 of his judgment, the learned Judge came to the following conclusions:

> In my judgment the plaintiffs in CS 22-295-86 went beyond just standing by and watching the issues fought out in CS C2169-85 (which alone according to Lord Denning is sufficient to successfully raise estoppel by conduct). It seems to me clear that they and each of them had directed their minds to the need to have the consent order set aside and had decided initially that the vehicle for obtaining that desired result need only be the application by Toh Seak Keng in the petition and when that failed the Civil Suit C2169-85 brought by Toh Seak Keng as plaintiff. There was clearly the intention to use those proceedings and there was active participation by them in each of those proceedings in the affirming of those affidavits by which they moved the Court for the desired result.
>
> The similar interest that Toh Seak Keng and the said members of his family had were not the shares but having the consent order set aside ...

With respect, it is not true that the appellants took active participation in both the petition and Toh's Civil Suit No. C2169/85. The joint affidavits filed by the appellants were both in respect of the petition. The appellants were not involved at all in Toh's civil suit. All along they had been active only in the petition right up to the time when they obtained the order to intervene. It is therefore incorrect for the learned Judge to conclude that the appellants intended to use Toh's civil suit for the purpose of setting aside the consent order. There could not be such an intention. The learned Judge must be under the wrong impression that one of the interlocutory applications in which the appellants had filed affidavit-in-support was in Toh's civil suit. Hence his erroneous finding that the appellants took active part "in each of those proceedings" and went beyond standing by and watching the issue fought out in Toh's civil suit which was the basis of his conclusion that there was estoppel by conduct. As stated elsewhere in this judgment, nor did the appellants stand by and watch their rights being fraught by Toh, as was the case of the plaintiff in *Abuakwa v. Adanse* who refused to intervene in a previous land dispute suit in a situation prevalent in West Africa at that time, where parties were in the habit of perjuring themselves to bolster up a land claim by later adducing evidence which had it been in existence, would or should have been adduced at the first trial. Whereas in the present case, pending the hearing of Toh's civil suit, the appellants independently of Toh, asserted their legal rights to set aside the consent order as far as it affected them, by successfully joining in as interveners in the petition, and by filing subsequently the present civil suit. In our judgment, neither did the appellants take active participation in CS C2169/85 and nor were they guilty of standing by and watching the issues affecting them being fought by Toh in that civil suit. We are therefore of the opinion that there is no basis upon which the learned Judge could have come to the conclusion that there was estoppel by conduct on the part of the appellants.

There is another reason why the principle of estoppel by conduct should not apply in this particular case. The consent order being a divisible one merely gives the appearance that the interest of Toh and the appellants are the same. For one thing, having the consent order set aside would revive Toh's interest in a declaration that he be restored as the general manager instead of being bought out by the company. But more importantly, their rights to set aside the consent order are founded on entirely different basis. Toh was the petitioner in the 1983 proceedings and was represented by Counsel at the hearing when the consent order was made, and his case was founded on the fact that he had never given instruction to his Counsel on the terms of the consent order. Whereas the appellants were not even parties to the petition and were not given an opportunity to be heard. The merit of the appellants' case has never been adjudicated upon; not even in the two proceedings brought by Toh, which were dismissed on procedural or technical grounds. As far as the appellants are concerned, all the respondents have readily conceded that the consent order was made without jurisdiction, and therefore unlike *Toh's* case, it is the duty of the Court to consider whether the appellants are entitled *ex debito justitiae* to set aside the consent order. Further, in granting the appellants' application to intervene, the Court must have been satisfied that the interests of the appellants and Toh in having the consent order set aside is not the same. Otherwise there appears to be no purpose in allowing them to intervene after Toh had failed to set aside the order in the first instance. In any event the existence of the order to intervene should constitute a sufficient "technical legal reasons to the contrary" referred to by the Privy Council in *Abuakwa v. Adanse*, (*ante*) which would prevent the application of the estoppel by conduct exception to the general rule.

On the issue of the appellants' entitlement to set aside the consent order *ex debito justitiae*, Counsel for the respondents seem to argue in his written submission that even an invalid or irregular order made by a superior Court must be complied with until the order is stayed or set aside. In *Isaacs v. Robertson* [1984] 3 All ER 140, Lord Diplock in delivering the judgment of the Privy Council disagreed with the proposition that disobedience to an interlocutory injunction alleged to be a nullity, could not constitute a contempt of Court and His Lordship approved the opinion of Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567 that a party who knows of an order whether null or void, regular or irregular cannot be permitted to disobey it. They should come to the Court and apply to have it discharged. Indeed, this is precisely what the appellants here have done. They have applied by the present civil suit to have the consent order set aside notwithstanding any concession given by both parties to the originating petition that the consent order was invalid and a nullity as far as it affected the appellants. However, in *Isaacs v. Robertson*, whilst rejecting the existence of a distinction between "void" and "voidable" orders for the purpose of complying with the Court order, Lord Diplock speaking in the Privy Council at p. 143 recognised the existence of a category of orders, even of the Court of unlimited jurisdiction which a person affected by the order is entitled to set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the Court without his needing to have resources to the rules that deal expressly with proceedings to set aside for irregularity and give to the Judge a discretion as to the order he will make. The definition of defects that bring an order into the category that attracts *ex debito justitiae* has not been finally defined save, according to Lord Diplock, "that it includes orders that have been obtained in breach of the rules of natural justice".

It should be emphasised that the principle stated by Lord Penzance in *Wytcherley v. Andrews* and applied in *Abuakwa v. Adanse*, relating to estoppel by conduct as a special exception to the cardinal rule of natural justice that a party must be given an opportunity to be heard before he is adversely affected, is founded on justice and common sense. It should therefore

never be applied except in the cause of justice and in a clear situation where a person in the same interest had the opportunity to be a party or to intervene but failed to do so. It is certainly inapplicable where an aggrieved party is entitled to a remedy *ex debito justitiae*.

In our view the defects in the present consent order are such that the appellants are entitled to have it set aside *ex debito justitiae* as far as it affected them. There is no denial that in breach of the rules of natural justice, the High Court had no jurisdiction to make the consent order affecting the rights of the appellants. In our view, if the learned Judge had directed his mind on the proper exercise of the inherent jurisdiction of the Court he would have exercised it in favour of the appellants and he would have ordered the consent order as far as it affected their shares in the company to be discharged.

For the above reasons, we find the appellants are not estopped from challenging the validity of the consent order. The appeal is accordingly allowed with costs both here and in the Court below. The order of the High Court is accordingly set aside and be substituted with an order that the consent order dated 3 October 1983 be set aside as far as it affects or binds the appellants. To that extent, the order of execution granted to the respondents must also be varied. The deposit is refunded to the appellants.

Also found at [1990] 2 CLJ 15